tended to enable the court in effect to make a charge on the man's future earnings, nor is it intended to furnish the creditor with a convenient and minatory process of execution; the Act merely gives the court jurisdiction to punish the debtor by committal for failing in the present or in the past to apply available means to meet the instalment or instalments in arrear. His default did not consist in his failure to pay the instalment; his default consisted in his failure to apply in payment of the instalment, means which he had available for the purpose. The section does not aim at punishing poverty or at punishing a man for incurring liabilities recklessly or improvidently, and it ought, of course, not to be used for that purpose: it aims at punishing a dishonest use for other purposes of funds which a man has or has had available towards paying what he has been ordered to pay: see the observations of Lord Halsbury L.C. in *Stoner* v. *Fowle*, 13 App. Cases 20, 24, 28 and those of Lord Bramwell, at p. 28."

In the circumstances of this case, and the judgment creditor having been given the fullest opportunity of justifying his claim to any monthly instalments, the result has been to prove that the named couple have only an income of not quite $100 between them per month for their living expenses. The order of April 9, 1962 ought not to hang over the heads of these debtors and accordingly that order is discharged under section 13 of the Ordinance.

*Order discharged.*

Solicitors: *Bannon & Bailey.*

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## CHAN KING YUE v. LEE & WONG

[O. C. J. (Suffian J.) August 30, 1962]

[K.L. — Civil Suit No. 448 of 1960]

*Partnership — Loan by wife of one partner — Money loaned handed to husband — Receipt made out in name of partnership — No express or implied authority to partner to borrow — Loan used to pay off debts of the partnership — Liability of partnership under section 204 of the Contracts (Malay States) Ordinance, 1950 — Liability under equitable rules.*

The husband of the plaintiff obtained from her the sum of $35,000 as loan from her to the firm of which he was a partner and he gave her a receipt in the name of the partnership. The money was paid into the partnership account and immediately thereafter utilised by the firm to pay off some of its debts.

In an action by the plaintiff to recover the loan, the other partner of the firm contended that the husband had no authority of the firm to borrow the money and it was made to the husband personally to his own use and benefit.

**Held:** (1) the borrowing was an "act necessary for the carrying on of the business" of the partnership under section 204 of the Contracts (Malay States) Ordinance and as such bound the co-partner;

(2) even apart from the statutory provision in the Contracts (Malay States) Ordinance, the fact that the loan had been utilised for the payment of the debts of the partnership, the lender was entitled in equity to stand in the same position as if the money had originally been borrowed by the partnership. *Bannatyne* v. *D. & C. MacIyer* (2) followed.

*Cases referred to:—*

(1) *Ram Chandra Sahu* v. *Kasem Khan*, A.I.R. 1925 Cal. 29.

(2) *Bannatyne* v. *D. & C. MacIyer* [1906] 1 K.B. 103.

The following cases were also cited in argument: *Wheatley* v. *Smithers* [1907] 2 K.B. 684; *Higgings* v. *Beauchamp* [1914] 3 K.B. 1192; *Chettinad Bank* v. *Chop Haw Lee & Anor.* [1931-32] F.M.S.L.R. 31; *Chop Cheong Tuck* v. *Chop Tack Loong & Ors.* [1934] M.L.J. 176.

CIVIL SUIT.

*Ng Kok Thoy* for the plaintiff.

*Y. S. Lee* for the defendant firm.

*L. E. Osman* for H. M. Lee.

*Cur. Adv. Vult.*

**Suffian J.:** The sole question for decision here is whether the defendant firm is liable to repay the plaintiff $35,000 which it is proved was given by her to her husband Mr. H. M. Lee, a partner of the firm, on 26th November, 1955, and which it is admitted was the same day put into the firm's bank account and was within the next few days used to pay the firm's creditors. Mr. Wong, the other partner, contends that the firm is not liable because—

(a) the loan if made was made to Mr. Lee personally,

(b) Mr. Lee had no authority to borrow for the firm and

(c) the money was borrowed by Mr. Lee on his own account and for his own use and benefit and not in the usual course of the firm's business.

In November 1955 Mr. Lee told his wife the plaintiff that he had been asked by his partner to find a loan for the firm and Mr. Lee obtained $35,000 from her. This was on 26th November, 1955. He wrote out and signed a receipt for this money, P.1. This receipt, No. 151, read as follows :—

"

No. 151

Lee and Wong,
Chan Wing Building,
Kuala Lumpur.

Date 26th November, 1955.

Received from Madam Chan King Yue [Mrs. Lee's name] the sum of Dollars thirty-five thousand, being short term loan with interest.

(Signed) Lee and Wong,
Engineering Contractors."

$35,000.

Mr. Lee had authority to issue receipts on behalf of the firm.

Mr. Lee did not give evidence, as to which I was not surprised, as the partners had parted company with bad feeling to spare and had Mr. Lee gone into the box, plenty more mud would have been thrown at him. His story as disclosed by cross-examination as well as by his counsel's submission is that he had express, if not implied, authority, from his partner to borrow the $35,000 on behalf of the firm, he borrowed it on behalf of the firm, the firm needed the money and spent it to pay its legal debts.

Now that I think I know the law applicable to this dispute, I should consider this case under three heads :—

(a) Did Mr. Lee have his partner's authority, express or implied, to borrow the

money on behalf of the firm? If so, it bound the firm.

(b) If not, was the loan necessary for carrying on the business of the firm? If so, it bound the firm.

(c) If the loan was not necessary for carrying on the business of the firm, was it in fact applied in paying the firm's legal debts and obligations? If so, it bound the firm.

As regards the first head, section 204 of the Contracts (Malay States) Ordinance No. 14 of 1950 reads as follows :—

"Each partner who does any act necessary for, or usually done in, carrying on the business of such a partnership as that of which he is a member binds his co-partners to the same extent as if he were their agent duly appointed for that purpose.

*Exception.*—If it has been agreed between the partners that any restriction shall be placed upon the power of any one of them, no act done in contravention of such agreement shall bind the firm with respect to persons having notice of such agreement."

From the above it is plain that, if Mr. Lee's borrowing was an act usually done in carrying on the business of the firm, it bound the firm. This firm ran the business of electrical engineers. Before granting the loan, Mrs. Lee had been told by her husband that he was asked by his partner, Mr. Wong, to find a loan for the firm. Mr. Lee himself elected to give no evidence. It was proved that clause 15(b) of the partnership agreement, exhibit D.18, expressly provided that—

"Neither partner shall without the consent of the other pledge the credit [of the partnership] except in the ordinary course of business and upon the account or for the benefit of the partnership."

Mr. Wong said he never consented to the borrowing, the firm in all the years of its existence since 1949 had never borrowed money and it was submitted on his behalf that his firm was not a trading partnership and therefore the partners had no implied authority to borrow money on behalf of the firm. I am not sure whether I agree with this submission, but in view of the conclusion which I have reached under the other heads, I decline to express an opinion on it. Instead I shall proceed on the basis that the partners had no implied authority to borrow for the firm. As to express authority (the onus of proving this is on the plaintiff), because of the failure of Mr. Lee to give evidence himself I find that it has not been established that he had express authority to raise this loan.

As regards the second head, it will be noted that section 204 of the Contracts (Malay States) Ordinance No. 14 of 1950 mentions two kinds of acts of a partner which binds his co-partners. The first kind is an act usually done in carrying on the business of the partnership. Such an act may be said to be within the mandate of the partnership. The second kind (and in this respect our law is different from that in India today and from that in England) is an act which is not usually done in carrying on the business of a partnership, i.e. an act without the mandate, but which is nevertheless necessary for carrying on the business of the partnership. Both these kinds of acts bind the partnership. Mr. Wong said in evidence that the management of the firm's affairs was entrusted to Mr. Lee only and owing to mismanagement by Mr. Lee money due to the firm had not been collected and if Mr. Lee had managed the firm properly, no loan should have been necessary to help the firm; also the firm had assets, though he did not suggest they should all have been sold to pay the firm's bills. In my view, the law does not make it necessary to consider whether the loan should or should not have been necessary but simply whether or not it was necessary. If it was necessary, then it bound the entire firm. As to this, in 1955 Mr. Lee was away in Europe from August until November, leaving Mr. Wong practically in sole charge of the affairs of the firm. Mr. Lee returned from abroad on 20th November, 1955. Mr. Wong admitted that at the end of each of the months of September, October and November, 1955, the firm was owing well over a hundred thousand dollars. On 25th November the firm had in the bank only $11,398.01. On 26th November Mrs. Lee parted with her $35,000 and her cheque was the same day paid into the firm's account, bringing the firm's credit balance up to $46,398.01. Within a few days the firm paid out by cheques (they were signed by both partners, so Mr. Wong knew all about them) the following amounts :—

| | |
|---|---|
| 28th November | $ 150.00 |
| 29th November | 930.18 |
| 1st December | 7,304.13 |
| 2nd December | 21,500.00 |
| 3rd December | 5,000.00 |
| 5th December | 500.00 |
| | 737.22 |
| | 571.30 |
| 6th December | 7,000.00 |
| | 230.18 |

By the end of that day the firm had only a credit balance of $5,358.63. Thereafter various sums were paid into the firms account, but also various sums were paid out, so that on 30th December the firm had only a credit balance of $16,068.50. The following January on four occasions the firm's account was overdrawn as follows :—

| | |
|---|---|
| 4th January | $ 619.53 |
| 6th January | 260.14 |
| 20th January | 3,501.75 |
| 21st January | 4,251.75 |

The following February the firm's account was overdrawn by $1,289.38 on the 11th. In these circumstances it is clear that the loan of $35,000 taken from Mrs. Lee was necessary for carrying on the business of the firm and therefore the firm was liable for it.

Further evidence of the necessity for this loan is to be found in the following. On 19th January, 1956, Mr. Lee wrote to Mr. Wong a note, exhibit D.2, as follows:—

"As we are very short of funds and also as I have advanced out $35,000 as a loan, I suggest that you try to raise some money to meet our bills. This is especially urgent before the Chinese New Year."

On 30th or 31st January, 1956, he sent Mr. Wong a further note, exhibit D.7, in the following terms:—

"(1) Any result of your raising the loan for the co.?

(2) ....."

These notes were written within less than two months of the loan.

Counsel for the firm contends that the words "and also as I have advanced out $35,000 as a loan" in exhibit D.2 is evidence that the loan was made by Mrs. Lee to Mr. Lee personally and that thereafter a loan to the firm was made by Mr. Lee and not by Mrs. Lee. I do not accept this interpretation, in view of the clear language of the receipt, exhibit P.2, which states that the loan received from Mrs. Lee was in fact made to the firm. In my view the words written informally in the note D.2 merely recorded the fact that the loan had been obtained for the firm from Mrs. Lee through Mr. Lee.

As regards the third head, the defendant firm's counsel cited *Ram Chandra Sahu* v. *Kasem Khan*[1] as authority for the proposition that even if this unauthorised loan was in fact spent for the benefit of the firm, it did not bind the firm. There it was said —

"It is thus clear that the ultimate use by a firm, of money borrowed by a partner individually on his own credit does not make the firm liable for the loan. The circumstance that the firm obtains the benefit of a transaction entered into by one of its members . . . may show that he entered into the contract as an agent of the firm. But the fact is no more than evidence that this was the case: and the question upon which the liability or non-liability of the firm depends is not whether the firm obtained the benefit of the contract, but did the firm by one of its partners or otherwise enter into the contract."

In Malaya the English rules of equity apply by reason of section 3 of the Civil Law Ordinance No. 5 of 1956 and the rule on this particular point was stated in *Bannatyne* v. *D. & C. MacIyer*,[2] a Court of Appeal decision, which did not appear to have been considered by the Calcutta Court. There Romer L.J., said —

"Where money is borrowed on behalf of a principal by an agent, the lender believing that the agent has authority though it turns out that his act has not been authorised, or ratified, or adopted by the principal, then, although the principal cannot be said at law, yet in equity, to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal. (at page 109).

The principle to which I have referred clearly governs this case. The facts speak for themselves, and it cannot be said that this is a mere speculative application on behalf of the plaintiff in the hope that he may be able to shew that some legal debts of the defendants have been paid off by means of money lent by the plaintiff. The banker's account is in evidence before us, and it appears that the money first borrowed went to the credit of the firm's account at their bankers, which was kept by the agent and the branch establishment. It further appears that immediately after the money was paid in, some legal debts of the firm were, in fact, paid off at the time when there was nothing in the bank to meet them except the money which had been borrowed of the plaintiff." (at page 110).

Here Mrs. Lee believed that her husband had authority to borrow though it later transpired she was mistaken, and her $35,000 was the same day put into the firm's bank account. Mr. Wong knew about this the same day or at least within a few days and he did not say he asked his partner to return the money to Mrs. Lee at once. Within a few days of the money being paid in, some legal debts of the firm were, in fact, paid off, though it was not true that there had been nothing in the bank to meet them. The evidence was that there had been some money in the bank but not enough to meet them all. The firm's liabilities had been decreased, not increased with the help of Mrs. Lee's money. In these circumstances, it is just and equitable that Mrs. Lee should stand in the same position as if the money had originally been borrowed by the firm.

Accordingly I order the firm to pay her $35,000 as well as interest at the rate of 6% per annum from today until the date of realisation and I also order the firm to pay her costs.

Before departing from this case, I would like to say a few words about the evidence the hearing of which took two and a half days. Since reserving judgment I have had occasion to refer to the authorities cited as well as to some authorities which I found for myself. If I had known about the law of partnership as much at the beginning of this case as at the end, much of the evidence which counsel for the firm tried to adduce and to some extent succeeded in adducing, particularly as regards the alleged mismanagement of the firm's affairs by Mr. Lee, would have been rigorously excluded, for in the end it became clear that the issues in this case were very narrow. While my ignorance subsisted, many opportunities were presented and taken of blackening Mr. Lee's character, but counsel must share part of the blame for this by their failure to instruct me, early on during the course of the proceedings, on the relevant law, probably in the belief, mistaken as it turned out, that I then required no instruction in this branch of the law. As to the accusations against Mr. Lee, in the end I came to the conclusion that for the most part they were quite immaterial to the issues here and, in any event, they were the fulminations of an angry ex-partner who had to find a scape-goat for the misfortunes suffered by his old firm.

*Judgment for the plaintiff.*

Solicitors: *Doraiswamy Aiyer & Kok Thoy; Y. S. Lee & Co.*